86-15

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DEVINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the exclusion of the testimony of an expert linguist to explain certain crucial, difficult-to-understand tape-recorded conversations is contrary to the language and intent of Fed. R. Evid. 702 and violates a defendant's right to present a defense?

2. Whether the Petitioner was deprived of his right to cross-examine witnesses when the District Court prevented him from questioning a key government witness concerning his failure to orally confirm alleged criminal activity while tape recording conversations with the Petitioner?

3. Whether the Petitioner's Sixth Amendment right to cross-examine was violated when hearsay statements of alleged co-conspirators were introduced without any particularized showing of the reliability of the statements and the declarants were not available to be cross-examined?

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN DEVINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, John Devine, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A, attached

hereto. The Order of the United States Court of Appeals denying a Petition for Rehearing appears in Appendix B, attached hereto. The Judgment Order and Sentence of the United States District Court for the Northern District of Illinois appears in Appendix C, attached hereto.

JURISDICTION

The Opinion and order of the United States Court of Appeals for the Seventh Circuit was entered on March 31, 1986 and published at 787 F.2d 1086. A Petition for Rehearing was denied in an order entered on May 6, 1986. This Petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him· to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 702 of the Federal Rules of Evidence reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 901 of the Federal Rules of Evidence reads:

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

STATEMENT OF THE CASE

Petitioner, John Devine, is a former Associate Judge of the Circuit Court of Cook County, Illinois. While an Associate Judge, the Petitioner was assigned to a branch court, Branch 64, in which he heard misdemeanor trials and preliminary hearings in felony cases. Petitioner was then

assigned to traffic court where he heard various traffic violations. Under Illinois law, at the conclusion of a criminal case, a defendant's cash bond deposit is routinely returned to his lawyer in payment for services upon the defendant's petition submitted to the court.

Former attorney Martin Schachter testified, pursuant to a plea agreement for favorable treatment, that for several months he paid the Petitioner one-third of the cash bonds refunded to him on cases in the Petitioner's branch courtroom in exchange for the referral of clients to Schachter. Former attorney Arthur Cirignani testified, under a grant of immunity and a promise not to prosecute, to three occasions in the branch court in which he claimed to have given the Petitioner money in exchange for referrals of clients. A third attorney testified to an occasion on which he believed the Petitioner

solicited a payment from him. The testimony of these witnesses was subject to forceful attack at trial based on bias and inconsistency.

The prosecution revolved its case around the credibility of an undercover informant named Terrence Hake. In closing argument, the prosecutor exhorted the jury to "forget about all that other evidence. I am going to put it right on the line to you. If you think Terry Hake is a liar, then John Devine shouldn't be here." Hake testified that he worked as a paid cooperative for the F.B.I. As a part of his work with the F.B.I., Hake posed as a defense attorney and represented F.B.I. agents in a number of criminal cases contrived by the F.B.I. Two of these cases were driving-under-the-influence cases which were before the Petitioner while he was assigned to traffic

court. Hake testified that on two occasions he gave $200 to a court clerk, Harold Conn, to be passed on to the Petitioner. Hake further claimed that on another occasion he directly gave $100 to the Petitioner. Hake recorded conversations with Conn, other court personnel, and the Petitioner with a body bug.

Crucial portions of the tape recordings were difficult to hear. Over objection, the government submitted to the jury transcripts of the tape-recorded conversations. In six critical instances, the parties differed sharply over what was being said on the tape recordings. In a seventh instance, the government attributed to the Petitioner a recorded statement which the defense maintained was actually said by another person. To support his position concerning these critical aspects of the tape-recorded

evidence, the Petitioner offered the testimony of Professor Robert W. Shuy, a linguistics professor at Georgetown University. The District Court ruled Shuy's testimony inadmissible. Applying established principles of phonetics, Professor Shuy would have testified to the jury that the difficult-to-hear portions of the tape recordings which were contested could not have been the words alleged by the government because the government's version was inconsistent with the phonetic indicia of the sounds which could be heard. In addition, Professor Shuy would have testified that certain statements which the government attributed to the Petitioner really were spoken by another person because the auditory and phonetic indicia of the statements were inconsistent with the phonetic indicia of other statements which the parties agreed

were spoken by the Petitioner. A brief review of three points of Professor Shuy's testimony highlights the reliability and the importance to the defense case of his testimony.

1. In the July 7, 1981 tape recording, Hake contended at trial that he was trying to confirm that the Petitioner was expecting money from him. Hake asks the Petitioner "Can I talk to you?". The government transcript indicates that Petitioner's response is inaudible; whereas Professor Shuy testified on voir dire that, in fact, Devine said, "No, I'm late for an appointment," while another person said, "Okay."

2. After these words, Professor Shuy also discerned the sound of footsteps, apparently the defendant walking away. Shuy further testified that the Petitioner's

voice, now at a distance from Hake's microphone, could faintly be heard saying, "Harold" followed by the sound of more footsteps. After the sound of footsteps, both parties heard the words, "The fellow coming down is who you can see." The government attributed these words to the Petitioner, whereas Professor Shuy concluded that they were uttered by another individual. Since the gist of the government's conspiracy theory is built around the Petitioner's alleged relationship with the court clerk, Harold Conn, and since this relationship was established through the Petitioner allegedly telling Hake to go see Conn, it was critical to the defense to be able to point to concrete testimony in the record that the voice saying, "See Harold" was not his.

3. Shuy further testified during voir dire concerning a February 3, 1983 tape-recorded conversation, during which, according to Hake, Hake directly paid money to the Petitioner. To corroborate this, Hake testified that when he said to the Petitioner, "Is one okay?" he then passed one hundred dollars to the Petitioner. Shuy concluded that the word "one" referred to the time of the next court call, opining that the Petitioner in response to Hake's questioner said, "Whenever you want:" rather than "whatever you want." In Professor Shuy's opinion, the Petitioner's statement was an innocent reference to the time at which he was to consider a motion to reinstate a bond rather than an appreciation for a payment.

The District Court precluded the Petitioner from cross-examining Hake concerning his methods of orally confirming

the payment of money on the tape recording. The Petitioner offered to show that in numerous past tape-recorded conversations with others involving the exchange of money, Hake, in order to make a record for trial on the tape, would confirm a payment by making an explicit reference to money contemporaneous with the payment, would state at the conclusion of the tape what had just transpired or would confirm the payment during a subsequent conversation.

In none of his conversations with the Petitioner did Hake ever confirm the two payments to the clerk Conn. Moreover, on the occasion of his one supposed direct payment to the Petitioner, Hake neither explicitly referred to money when he supposedly handed the Petitioner one hundred dollars nor did Hake state into the microphone after the conclusion of the conversation that he had just paid money to the Petitioner.

The recorded statements of Harold Conn were introduced as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). Counsel for the Petitioner made a proffer, accepted by the District Court, that Conn had told him that Conn did not pass on to the Petitioner the money which Conn received from Hake on those two occasions. The District Court also admitted into evidence under this same exception the hearsay statements of an attorney Harry Klepper elicited from Joseph Trunzo, a former police officer who testified under a misdemeanor plea agreement. Trunzo claimed that Klepper told him that he was upset because the Petitioner wanted money to give Klepper a result in a traffic case. Trunzo could not tie the statements to any particular case or a date.

Petitioner was convicted after a jury trial of mail fraud in violation of 18 U.S.C.

§1341, extortion under color of official right in violation of 18 U.S.C. §1951, and racketeering in violation of 18 U.S.C. §1962(c) for his receipt of bribes.*

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantees that a defendant in a criminal trial has the right to present witnesses on his behalf and the right to confront and cross-examine witnesses who testify against him. The issues presented by this Petition for Writ of Certiorari are of considerable importance to the exercise of these Sixth Amendment rights. First, the Court of Appeals erred in holding that the testimony of an expert linguist offered by the Petitioner to explain certain difficult-to-comprehend portions of

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* Petitioner was acquitted of two counts of extortion.

the audiotaped evidence was not admissible under Fed. R. Evid. 702. The Court of Appeals' holding rests upon an overly restrictive view of expert testimony which is contrary to the plain language and intent of Rule 702. The exclusion of this reliable, helpful expert testimony deprived the Petitioner of his right and the only viable means to put on a defense.

Second, the Petitioner was deprived of his right to cross-examine the central witness when the District Court prevented the Petitioner from questioning Hake on his failure to confirm on tape ever giving money to the Petitioner when his past practice had been to document on tape each payment he had made. The Court of Appeals' holding in this case is contrary to the principles of Davis v. Alaska, 415 U. S. 308 (1974).

Third, this Petition presents an opportunity to address the question which

this Court left open in United States v. Inadi, 106 S.Ct. 1121, 1124 n.3 (1986), as to whether the Confrontation Clause requires that declarations of co-conspirators who are not present in Court for cross-examination have a demonstrated indicia of reliability before they can be admitted for substantive purposes against a criminal defendant under Fed. R. Evid. 801(d)(2)(E). The decisions of the lower courts are in conflict on this question.

1. The Court of Appeals violated both the language and intent of Fed. R. Evid. 702 and the Petitioner's right to present a defense when it held that an expert linguist could not explain certain crucial, difficult-to-understand portions of tape-recorded conversations between the Petitioner and the central government witness.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The Court of

Appeals disregarded this precious right with an overly restrictive interpretation of Fed. R. Evid. 702 which is contrary to both the language and intent of that Rule. In so doing, the lower court created a dangerous precedent for dealing with the recurring evidentiary problems associated with tape-recorded evidence.

In order to expand the use of expert testimony, Rule 702 replaced the stiff common-law requirements for the admissibility of expert testimony with two standards: First, that the testimony be reliable because its probative value outweighs any prejudice: and second, that the testimony be "helpful" to the trier of fact. United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985): Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984).

Professor Shuy's testimony was reliable evidence. The linguistic principles upon which his expert opinion was based are well established, even though the application of those principles is novel. The Court of Appeals did not affirm exclusion of Professor Shuy's testimony on the ground that his expert opinion was not "reliable", but rather on the ground that Professor Shuy's testimony would "not have given the jury significant help in understanding the evidence or in determining a fact in issue, and understanding what is said in a tape-recorded conversation is not outside the average person's understanding." App.3a*

*The Court of Appeals incorrectly applied the abuse of discretion standard to what is a question of law. Questions of the proper scope and meaning of the Federal Rules of Evidence are legal questions subject to de novo review on appeal. Only questions of admissibility of evidence which involve factual determinations are reviewed for an abuse of discretion. See, e.g., United States v. Owens, 789 F.2d 750, 753 (9th Cir. 1986).

The Court of Appeals' holding that expert testimony must "significantly help" the trier of fact is contrary to the plain language of Rule 702, which requires only that the expert testimony "assist" the trier of fact. Further, expert testimony which is reliable is not inadmissible under Rule 702 because it deals with a subject concerning which the jurors, as ordinary persons, may also have some knowledge. Fed. R. Evid. 702 advisory committee note. See also Davis v. Combustion Engineering, Inc., 742 F.2d at 919; In Re Japanese Electronics Products, 723 F.2d 238, 279 (3rd Cir. 1983).*

Clearly, Professor Shuy's testimony would have helped the trier of fact in determining what was being said and by whom.

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*In its opinion, the Court of Appeals never addressed Rule 901(b)(5), even though Shuy's voice identification was plainly admissible under that Rule.

Although involving different senses, Professor Shuy's testimony is analogous to those cases in which expert witnesses were able to testify as to the identity of persons appearing in surveillance photographs. See e.g., United States v. Barrett, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983). United States v. Snow, 552 F.2d 165 (6th Cir. 1977); United States v. Brown, 511 F.2d 920, 924 (2d Cir. 1975). In these cases, the jury could see and compare for itself the defendant's appearance or clothing with the person or clothing which appeared in the surveillance photograph. However, because an expert witness's specialized knowledge could assist the jury in its understanding of a surveillance photograph, the courts permitted those experts to testify. Similarly, the expert testimony of graphologists is now routinely admitted even though a jury can

compare handwriting through its own study.*

The refusal to permit this reliable, helpful expert testimony effectively prevented the Petitioner from presenting a defense to the charges against him. First, Hake was permitted to testify freely concerning what he believed was being said and by whom on the tape recordings, even though he had no independent recollection of the conversations recorded. The Petitioner, who chose not to testify, was prevented from presenting any evidence to rebut Hake's testimony by the exclusion of Shuy's testimony.

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*The District Court's finding that listening to surreptitiously obtained recordings is not outside the average person's understanding is irrelevant, since the proper inquiry under Rule 702 is whether the testimony would be helpful. In any event the finding is plainly erroneous. Just as visual experts in surveillance photograph cases are permitted to make sense out of the jumbled images of a surveillance photograph, Professor Shuy should have been permitted to make sense for the jury out of the jumbled aural images of the tape recordings which were introduced in this case.

The Court of Appeals' holding in this case places a defendant in a tape case in an incredible dilemma of either surrendering his constitutional right not to testify in order to rebut government testimony concerning difficult-to-hear tape recordings or of exercising the right not to testify and thereby leaving the government's testimony unchallenged.

Second, the credibility of the undercover informant Hake was the crucial issue at trial. The lack of credibility of the other government witnesses was plainly exposed at trial and counsel for the government attempted to bolster the credibility of its other witnesses by focusing on the taped evidence and the credibility of Hake. In closing argument, the government attorney repeatedly told the jury that it should acquit the Petitioner of all the charges if

the jury did not believe Hake's testimony. Professor Shuy's testimony directly contradicted Hake's and the exclusion of Shuy's testimony took out of the Petitioner's hands his most effective tool for attacking Hake's credibility.

Third, the Court of Appeals' assertion, that defense counsel's argument would have the same effect as the transcripts Professor Shuy prepared, App. 2a-3a, is simply unfounded.* Arguments of counsel are not evidence, as the jury was instructed in this case. Thus, the argument of the trial counsel for the Petitioner concerning the tape recordings was no substitute for the expert testimony of Professor Shuy explaining

*Indeed, quite the opposite was true in this case. As the District Court recognized, defense counsel was hampered in his closing argument by the need to struggle with playing the tape recordings and offer his own opinion as to the meaning of the recordings.

why the government's version of the tape recordings was in error.

Law enforcement officers have increasingly relied upon tape-recorded evidence in their investigations. Under the Court of Appeals' holding in this case, defendants in criminal trials are left without any tools to attack this powerful but malleable evidence. Given the importance of tape-recorded evidence in criminal prosecutions in general and in this case in particular, this Court should grant the Writ in order to consider the important, recurring question of whether expert testimony explaining difficult-to-understand portions of a hotly-contested audiotape should be admitted under Rule 702.

2. The Petitioner was deprived of his right to cross-examine witnesses when the District Court prevented the Petitioner from questioning a key government witness concerning his failure to document alleged criminal activity for the tape recording.

The undercover informant Hake had used a body mike for nearly three years while engaging persons suspected of crimes in conversation. The Petitioner attempted to prove Hake's past practice of making an explicit reference to money as it was paid, of using a subsequent conversation to confirm receipt of a payment, and of stating the name of the person to whom he had just given money at the conclusion of each tape-recorded conversation. In the present case, Hake failed to follow his own practices when he allegedly gave money to the court clerk Conn

or to the Petitioner. After the two payments to Conn, Hake never attempted to engage the Petitioner in any conversation in order to determine if the Petitioner had received the payments. In addition, Hake never made any explicit reference to money at the time that he claimed he gave money to the Petitioner directly and Hake never spoke into the microphone after the conclusion of that conversation. Hake's departure from his past practice is truly incredible in light of the fact that this was supposedly the first time Hake had directly given money to a judge in an investigation which had lasted nearly three years.

The Petitioner's attempt to impeach Hake's testimony by his failure to adhere to his past practices would undoubtedly have made a difference to the jury had they been permitted to hear it. Yet, the Court of Appeals incorrectly upheld the District

Court's reasoning that the inquiry which the Petitioner wished to pursue was "legally irrelevant, [since] there may have been no opportunity for Hake to make any confirming statements in certain instances when giving bribe money for fear he would tip off the conspirators." App. 5a.

The Confrontation Clause of the Sixth Amendment guarantees that the accused in a criminal prosecution be given the right to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Delaware v. Fensterer, 106 S.Ct. 292, 294 (1986) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)). See also Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986). In the case at hand, the District Court barred any cross-examination concerning Hake's failure

to follow past practices. Clearly, Hake's answers to counsel's questions were relevant. If, as the Court of Appeals hypothesizes,* Hake had no opportunity to employ the techniques he had used in the past, then Hake should have been required to so testify. It was for the jury, not the District Court, to judge the plausibility of Hake's answer in light of his past practices. This Court should review the judgment of the Court of Appeals in order to determine whether the Sixth Amendment guarantees a defendant the right to cross-examine a witness who has tape recorded a defendant's conversation concerning the witnesses' methods of documenting criminal activity for the tape recording.

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*Nothing in the record supports the hypothesis. Hake was alone with the Petitioner when he claimed to have paid him and so there were no conspirators who could have been tipped off.

3. In holding that the hearsay statements of alleged co-conspirators were admissible even though the declarants were unavailable for cross-examination and the statements had no demonstrated reliability, the Court of Appeals deprived the Petitioner of his right to cross-examine and deepened the conflict between the Circuits.

This Petition presents this Court with an opportunity to determine whether the declarations of co-conspirators who are not present in court for cross-examination must have a demonstrated indicia of reliability under the Confrontation Clause of the Sixth Amendment before the statements can be admitted for substantive purposes against a criminal defendant under Fed. R. Evid. 801(d)(2)(E). There is presently a conflict among the lower courts concerning this issue. Three Circuit Courts of Appeals have held that the Confrontation Clause requires that co-conspirator statements have a particularized indicia of reliability if the declarant is not available for cross-examination. United States v. DeLuna, 763

F.2d 897 (8th Cir. 1985); United States v. Ordonez, 722 F.2d 530 (9th Cir. 1983); United States v. Perez, 702 F.2d 33 (2d Cir. 1983), cert. denied, 462 U.S. 1108. Three Circuits have reached an opposite conclusion, holding that the requirements of the co-conspirator exception satisfy the Confrontation Clause. Browne v. Marshall, 760 F.2d 117 (6th Cir. 1985); United States v. Gironda, 758 F.2d 31 1198 (7th Cir. 1985); Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973).

The hearsay statements at issue in this case clearly do not have the particularized showing of reliability which the Confrontation Clause requires. Counsel for the Petitioner made a proffer that the court clerk named Conn had told him that there was no conspiracy between Conn and the Petitioner and that Conn had not passed onto the Petitioner the money he received from Hake.

Similarly, former police officer Trunzo's testimony concerning the hearsay declaration of an attorney named Klepper was plainly too vague to meet any requirement of trustworthiness. This Court should grant the Writ in order to resolve the conflict among the Circuits concerning this important Sixth Amendment issue.

CONCLUSION

For the foregoing reasons, Petitioner, John Devine, respectfully prays that this Honorable Court issue the Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-3183

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN DEVINE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 CR 981—Susan Getzendanner, *Judge.*

ARGUED NOVEMBER 1, 1985—DECIDED MARCH 31, 1986

Before CUMMINGS, *Chief Judge,* CUDAHY, *Circuit Judge,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Defendant John J. Devine was convicted of knowingly and willfully devising and participating in a scheme to defraud in violation of 18 U.S.C. §§ 1341, 1951 and 1962(c). Judge Susan Getzendanner of the Northern District of Illinois sentenced him to numerous concurrent 15-year terms of imprisonment. For the reasons set forth below, we affirm.

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

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Defendant, a former Cook County Associate Judge, was convicted of orchestrating deals with attorneys to fix cases for monetary payments. At trial two attorneys, Martin Schachter and Arthur Cirignani, testified they paid defendant to secure favorable results and to be "court-appointed" to represent defendants in future "deals." Devine usually requested one-third of the attorneys' fees for a fixed case. The attorneys usually secured their fees from clients' bond money. In addition to the testimony of the two attorneys mentioned above there was the testimony of F.B.I. agent/informant Terrence Hake who worked "undercover" in defendant's courtroom as part of the now famous Operation Greylord investigation. He verified defendant Devine accepted money from him. A third attorney, Howard Shaffner, testified he personally had an encounter with defendant and believed defendant was trying to "shake him down." Additionally, Chicago police officer Joseph Trunzo testified he witnessed an attorney named Harry Klepper leave defendant's courtroom upset one day because defendant demanded he be paid additional dollars to secure the result Klepper desired. We believe there is little need to detail other testimony at the trial. In sum, we find no paucity of evidence from which defendant could have been found guilty as charged.

Defendant claims reversible error occurred because the district court refused to allow a linguist, Dr. Robert Shuy, to testify concerning difficult to hear sections of a "body-bug" tape produced by F.B.I. agent Hake. Hake produced such tapes while "dealing" with defendant and his courtroom personnel. Defendant claims that since the government was allowed to present transcripts of its version of the conversations to the jury, the exclusion of Dr. Shuy's testimony denied him his right to a fair trial and his Sixth Amendment right to present an adequate defense. Defendant adds Dr. Shuy's testimony was reliable and helpful and therefore should have been presented to the jury under Rule 702 of the Federal Rules of Evidence. We note that Dr. Shuy testified during defendant's offer of proof and stated, contrary to defendant's assertions, that

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if defense counsel were allowed to play the tapes to the jury and present its argument it would have the same effect as any transcripts given to them. The tapes were played. Shuy also rejected defendant's argument that he would be using his expertise in understanding the context and dynamics of conversations in analyzing the tape. Shuy claimed he would rely instead on auditory and phonetic indicia, i.e., listening skills. The district court concluded Shuy's testimony would "not have given the jury significant help in understanding the evidence or in determining a fact in issue, and understanding what is said in a tape recorded conversation is not outside the average person's understanding." (D. Ct. Op. of Dec. 17, 1984 at 3) We agree. "We will reverse the court's ruling on the admissibility of expert testimony only upon a clear showing of abuse of discretion." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1241 (7th Cir. 1982) (See also *Contractor Utility Sales Co. v. Certain Teed Corp.*, 748 F.2d 1151, 1155 (7th Cir. 1984). We see no clear abuse of discretion here. We also reject defendant's argument he was unable to present his version of what the tapes said. Defendant's counsel cross-examined Agent Hake for three days. The tapes were played during this cross-examination on equipment identical to that used by Dr. Shuy. Portions of the tapes contested by defendant were deleted when given to the jury in transcript form during deliberations. We see no reversible error.

Defendant claims that the district court committed procedural error in disallowing the Shuy testimony because it ruled on independent grounds that defendant had failed to meet his burden under Fed.R.Crim.P. 16(b)(1)(B). This was because defendant failed to furnish the government with information concerning Dr. Shuy's review of the Hake tapes. The district court ruled Shuy's notes on the government's transcripts constituted reports under Fed. R.Crim.P. 16(b)(1)(B) and defendant had an obligation to produce the reports since they concerned a central issue in the case. Defendant further asserts the district court erred in excluding Dr. Shuy from the trial merely because he was in the courtroom during arguments about the ad-

missibility of his testimony. Suffice it to say we believe there were adequate independent substantive grounds for excluding the Shuy testimony and therefore, assuming *arguendo* there was error in the procedural arena, it was harmless error.

Defendant claims the district court erred in refusing to allow defendant complete discovery concerning the entire scope of the "Operation Greylord" investigation of which Agent Hake's activities were a part. Defendant asserts, "It cannot be said that . . . no set of facts could be proven upon which the Defendant would have been entitled to suppression of the tape recordings." (Defendant's br. p. 57) We note the propriety of the tactics employed in the "Operation Greylord" investigation was upheld in *United States v. Murphy*, 768 F.2d 1518, 1528-1529 (7th Cir. 1985). Importantly, defendant was allowed discovery concerning cases which involved him. We see no error here.

United States v. Murphy, supra also eliminates two other arguments advanced by defendant. Defendant claims his conviction under the Hobbs Act (18 U.S.C. § 1951) should be reversed because his activities did not have a sufficient effect on interstate commerce. He also claims the mailing of bond refund checks to "insider attorneys" did not sufficiently advance the scheme to defraud as required under the provisions of the Federal Mail Fraud Statute, 18 U.S.C. § 1341. Both these arguments were rejected in *Murphy*. (See 768 F.2d at 1530-1531 concerning the Hobbs Act issue and 768 F.2d at 1529-1530 concerning the mail fraud argument).

Defendant asserts the trial court erred in admitting the hearsay statements of Harold Conn and Harry Klepper. We believe it rather obvious from evidence independent of Conn's statements that Conn was a part of the conspiracy at issue in this case. We therefore find no error in admitting the Conn statements under Federal Rule of Evidence 801(d)(2)(E) as a statement of a co-conspirator. (See also *United States v. Gironda*, 758 F.2d 1201, 1217

No. 84-3183

(7th Cir. 1985); *United States v. Jefferson*, 714 F.2d 689, 696 (7th Cir. 1983)). The district court admitted the relevant Klepper statements through Officer Trunzo because they were not offered for the truth of the matter asserted, but instead to explain Trunzo's actions. We do not believe the admission of these statements amounts to reversible error in this case.

Defendant's final argument is that the district court erred in limiting his cross-examination of Agent Hake. Defendant particularly objects to his inability to ask Hake about the absence of confirming statements by Hake at certain times after Hake gave a co-conspirator bribe money. Hake, for obvious reasons, would try to document the giving a bribe whenever possible by making a confirming type of remark. Defendant claims, for example, he should have been able to ask Hake the question "When you left on February 3, did you say anything on that tape recorder about giving Judge Devine money?" (see defendant's br., p. 61). The district court found evidence of a lack of a confirming statement by Hake at any given time legally irrelevant, stating there may have been no opportunity for Hake to make any confirming statements in certain instances when giving bribe money for fear he would tip off the conspirators. We see no abuse of discretion on the part of the district court here. We note defendant was allowed extensive cross-examination of Agent Hake over a three-day period which covered 650 pages of trial transcript.

We close by stating we leave this case with the impression that the evidence presented against defendant Devine at trial was very strong. Testimony from several reliable, credible and independent sources indicates defendant Devine was properly convicted of conduct so despicable we will not engage in a battle of adjectives in an attempt to describe it. The evidence speaks for itself.

One final caveat is appropriate. Defendant asked for and was mercifully granted leave to file an oversized brief by this court. The brief was desultory in nature; in general

a poorly written product with numerous typographical errors. It was obviously never edited by a caring professional. As a panel of judges already overburdened with cases and paper, we find it insulting to have to dutifully comb through a brief which even its author found little reason to give such attention. We condemn this type of shoddy professionalism.

For the reasons set forth above, the decision of the district court is hereby AFFIRMED.

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APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 6, 1986

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN DEVINE, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 83 CR 981 Susan Getzendanner, Judge.
No. 84-3183	

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

APPENDIX C

DOCKET NO. 83 CR 981-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 12-18-84.

COUNSEL

Without Counsel — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

With Counsel — EDWARD M. GENSON

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea. — Nolo Contendere, Not Guilty

FINDING & JUDGMENT

There being a verdict of

Not Guilty. Defendant is discharged

Guilty.

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully and unlawfully devising and participating in a scheme to defraud.

IN VIOLATION OF TITLE 18, U.S. CODE, SECTIONS 1341, 1951 AND 1962(d).

SENTENCE OR PROBATION ORDER

FIVE (5) YEARS on each of Counts 1 through 21 of Third Superseding Indictment. Said terms of incarceration on Counts 1-3, 4-6, 7-9, 10-12, 13-15, 16-18 and 19-21 are to run consecutive to each other, thus creating seven 15 year terms of incarceration. Each of said 15 year terms to run concurrently with the other 15 year terms imposed in this paragraph and to the FIFTEEN (15) YEAR terms of incarceration imposed on each of Counts 22-40, 43-48 and 49 of the Third Superseding Indictment.

IT IS ADJUDGED that on each of Counts 22-40, 43-48 and 49 of the Third Superseding Indictment, that defendant is sentenced to 15 years incarceration. Each of these 15 year terms to run concurrent with each other and concurrent to the terms imposed on Counts 1-21 as set forth in the preceding paragraph.

SPECIAL CONDITIONS OF PROBATION

On government's oral motion, the Original, First and Second Superseding Indictments are hereby dismissed. Execution of sentence is stayed until January 25, 1985. Defendant is directed to surrender directly to the designated institution on January 25, 1985.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation of a violation occuring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends Lexington, Kentucky.

/s/ Susan Getzendanner
Date: December 18, 1984

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-15

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the district court acted within its discretion in excluding testimony of an expert witness that would have been based on what he believed he heard on audiotapes that were played for the jury.

2. Whether the district court acted within its discretion in prohibiting defense counsel from asking certain questions during the three-day cross-examination of a prosecution witness.

3. Whether the district court properly admitted co-conspirator statements in the absence of any Confrontation Clause objection.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-15

JOHN DEVINE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-6A) is reported at 787 F.2d 1086.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1986. A timely petition for rehearing was denied on May 6, 1986. The petition for a writ of certiorari was filed on July 7, 1986, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of 23 counts of mail fraud, in violation of 18 U.S.C.

1341; 23 counts of interference with commerce by means of threats or violence, in violation of 18 U.S.C. 1951; and one count of racketeering, in violation of 18 U.S.C. 1962(c). He was sentenced to concurrent terms of 15 years' imprisonment. The court of appeals affirmed (Pet. App. 1A-6A).

1. The evidence at trial showed that petitioner, a state court trial judge in Chicago, Illinois, fixed cases in exchange for money from attorneys. In one scheme, petitioner appointed selected attorneys to represent defendants whose cases were assigned to petitioner's court, awarded fees to the attorneys from the defendants' bond money, and fixed the cases in exchange for one-third of the fee. Three attorneys testified that they either paid money to petitioner or were "shaken down" by petitioner while he was a criminal court judge. Pet. App. 2A.

In another scheme, which occurred after petitioner switched from criminal court to traffic court, attorney Terrence Hake gave money to petitioner or petitioner's court assistant, Harold Conn, on three separate occasions in exchange for decisions favorable to Hake's clients. Petitioner was unaware that Hake was an FBI undercover agent during the FBI's "Operation Greylord," which investigated corruption in the Chicago state court system. Hake posed as a corrupt defense attorney who would bribe judges in return for favorable decisions. Pet. App. 2A.

During his dealings with petitioner and Conn, Hake wore a "body bug" to record their incriminating statements. In Hake's first transaction with petitioner and Conn, Conn requested $150 for the judge and whatever amount Hake wished to give Conn in exchange for a decision by petitioner favorable to one of Hake's clients. Conn also explained why petitioner's ruling was favorable to Hake, and he identified some of the "bad" judges in the state court system. On that occasion, Hake gave Conn $150 for petitioner and $50 for Conn. Tr. 1386-1388; GXs Benson 1, 1A.

On the second occasion, Hake delivered $260 to Conn after petitioner had issued a decision favorable to Hake's client. During the exchange, Conn told Hake that petitioner wanted $200 for his decision and that Conn had assisted petitioner in ruling in favor of Hake's client by falsifying a court document. On the third occasion, Hake delivered $100 to petitioner following a ruling by petitioner favorable to Hake's client. Petitioner accepted the money and told Hake that the amount was sufficient. Tr. 1404, 1427, 1432, 1433, 1437-1440, 1447, 1455-1456; GXs Cramer 1, 1A, 2, 2A; Group Exh. 46.

To counter the impact of the recorded conversations, petitioner offered the testimony of Dr. Robert Shuy, a linguist with expertise in "contextual analysis." During a proffer, Shuy testified that he had listened to the tape recordings and had read the transcripts of the tapes that Hake had prepared. On the basis of listening to the tapes, Shuy differed with Hake as to the contents of the conversations. As became clear on voir dire, Shuy did not use contextual analysis in reaching his opinions about what was said, but proposed to testify as an "expert listener" without regard to the context of the conversation. When questioned by the court, Shuy agreed that, if defense counsel played the tapes to the jury and suggested defendant's versions of the words at issue, that would serve the same purpose as Shuy's proffered testimony. Pet. App. 2A-3A; Tr. 2476-2477, 2558-2560.

In a written opinion issued December 17, 1984, the district court excluded Shuy's testimony for two reasons. First, petitioner had failed to comply with Fed. R. Crim. P. 16(b)(1)(B) by withholding Shuy's report of his examination of the taped conversations from the government, thereby preventing the government from preparing an effective rebuttal to Shuy. Second, the court concluded that Shuy's

testimony would not have provided the jury with "significant help in understanding the evidence," because the jury was capable of understanding the contents of the recorded conversations. During cross-examination of Hake, however, the court allowed petitioner to play the tapes on equipment identical to that used by Shuy. In addition, the court deleted those conversations that petitioner contested from the transcripts that were given to the jury during deliberations. Pet. App. 2A-3A.

To impeach Hake's credibility, petitioner attempted to show that Hake's procedures for recording petitioner's conversations were different from his recording procedures in other cases in which Hake posed as a recipient of bribes from corrupt attorneys. In this case, petitioner did not confirm each bribe on the tapes after he gave the money to petitioner or Conn. In the other cases, Hake had made statements on the tapes confirming the receipt of money from the bribe-givers. During the three-day cross-examination of Hake (see Pet. App. 5A), defense counsel was allowed to ask a number of questions about the difference between instances in which Hake did confirm bribes and instances in which Hake did not confirm bribes (Tr. 1500-1504, 1515-1519, 1521, 1525, 1535, 1544, 2157). Defense counsel argued the significance of this point in closing argument (Tr. 2661, 2721, 2738).

The district court, however, regarded as only marginally relevant the difference between Hake's conduct as a bribe-taker and his conduct as a bribe-giver. As the court noted, a bribe-taker, unlike a bribe-giver, may confirm a receipt of money, without arousing suspicions, by thanking the giver. The district court therefore refused to permit several questions directed to this issue on grounds of relevance and waste of time. The court pointed out that the already lengthy cross-examination of Hake would be further protracted if defense counsel were permitted to inquire into

each of the 23 taped conversations in which Hake had received bribe money. Pet. App. 5A; Tr. 1566-1567, 1667-1668.

During the trial, petitioner objected on hearsay grounds to the admission of Conn's statements to Hake. The district court admitted Conn's statements as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). Petitioner did not ask the district court to conduct a separate inquiry into the reliability of the statements in order to determine whether their admission would violate the Confrontation Clause. Petitioner also objected on hearsay grounds to the admission of statements by attorney Harry Klepper to policeman Joseph Trunzo. Trunzo testified that he was a conduit for bribes between petitioner and attorneys. On two occasions, Klepper gave envelopes to Trunzo and angrily told him to give them to petitioner. The district court admitted Klepper's statements as nonhearsay because they were offered not to prove the truth of the matter asserted but to explain Trunzo's conduct. Pet. App. 4A-5A; Tr. 1347, 1355, 2192-2196.

2. The court of appeals affirmed (Pet. App. 1A-6A). First, the court held that the district court properly excluded Shuy's testimony because Shuy's testimony was based only on listening to the tapes and not on his expertise and therefore would not help the jury (*id.* at 2A-3A). The court also upheld the district court's rulings that Conn's statements were properly admitted under Fed. R. Evid. 801(d)(2)(E) and that Klepper's statements were not hearsay (Pet. App. 4A-5A). Petitioner had not contended that the admission of those statements violated the Confrontation Clause, and the court therefore did not address any Confrontation Clause question. Finally, the court held (*id.* at 5A) that the district court had not abused its discretion in limiting petitioner's cross-examination of Hake. Noting that petitioner was permitted extensive cross-examination of Hake over a three-day period, the court found that the

district court did not err by limiting petitioner's questions about Hake's failure to make confirming statements during some of the tape-recorded conversations.

ARGUMENT

As a preliminary matter, all of petitioner's challenges to his conviction are limited to the RICO count and those extortion counts that involved undercover agent Hake and petitioner's actions as traffic court judge. On those counts, petitioner received sentences that were concurrent with his sentences on the mail fraud and other extortion counts. In these circumstances, review of petitioner's claims is unwarranted because even complete acceptance of all of petitioner's arguments would give him no practical benefit. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

1. Petitioner first contends (Pet. 16-24) that the district court's exclusion of Shuy's testimony violates Fed. R. Evid. 702. Yet, as this Court has recognized, "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous" (*Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962)). The action of the district court in this case was not manifestly erroneous. The issue was simply what was said on tapes that were played to the jury. Shuy's expertise in "contextual analysis" could not help the jury understand what was said, for Shuy admitted that he would base his testimony simply on what he heard, not on contextual analysis. In ruling that playing the tapes to the jury would serve the same purpose as allowing Shuy to testify, the court correctly concluded that "the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject" (Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952), quoted in Fed. R. Evid. 702 advisory committee note).

Other courts of appeals have upheld the exclusion of linguists' testimony. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 912 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Schmidt*, 711 F.2d 595, 598-599 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); see also *Chesebrough-Pond's, Inc.* v. *Faberge, Inc.*, 666 F.2d 393 (9th Cir.), cert. denied, 459 U.S. 967 (1982). The cases on which petitioner relies (Pet. 20) involve expert interpretation of surveillance photographs, a field in which the utility of expert testimony is more widely acknowledged (see 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02], at 702-10 to 702-11 (1985)). In any event, those cases hold only that the admission of expert testimony in the circumstances of each case was not clearly erroneous.*

Finally, there is no merit to petitioner's assertion (Pet. 21-24) that the exclusion of Shuy's testimony prevented him from presenting his version of the taped conversations to the jury. In addition to conducting a three-day cross-examination of Hake, petitioner received extraordinary procedural protections so that he could present his version of the conversations (see page 4, *supra*).

2. Petitioner also contends (Pet. 25-28) that the district court restricted his cross-examination of Hake in violation of the Sixth Amendment. This fact-bound question merits no further review.

Under the Confrontation Clause, a defendant has the right to cross-examine a government witness to impeach his credibility (*Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986)). A district court, however, may restrict cross-examination that is repetitive or harassing, confuses the

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*Even if the district court's application of Rule 702 in this case were manifestly erroneous, its ruling would still be correct because of petitioner's failure to comply with Fed. R. Crim. P. 16(b)(1)(B) by not disclosing Dr. Shuy's reports and notes to the government before trial.

issues, or is only marginally relevant (slip op. 6; see also Fed. R. Evid. 403). The district court's rulings were consistent with those guidelines.

The district court allowed petitioner to ask Hake about his failure to confirm his bribe-giving to petitioner or Conn on the tapes and to argue to the jury the significance of that failure. The court restricted petitioner only from delving at length into Hake's other investigations and from asking Hake argumentative questions about his reasons for failing to make confirming statements on some of the tapes in this case. Rather than holding those questions entirely irrelevant, the trial judge advised the jury that it could consider differences between the tapes, and the judge allowed defense counsel to argue the point to the jury (see Tr. 2146). The court was correct, however, in holding that the difference between Hake's role as bribe-taker and his role as bribe-giver rendered questions about Hake's conduct in earlier cases no more than marginally relevant. It was therefore proper for the court to curtail the lengthy cross-examination of Hake accordingly.

3. Petitioner also contends (Pet. 29-31) that the district court did not comply with the Confrontation Clause when it admitted Conn's and Klepper's statements as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) without requiring the government to show that the statements bore specific indicia of reliability. Although petitioner correctly notes that the courts of appeals are divided on this issue, this case does not warrant review.

Klepper's statements were not admitted for the truth of any matters asserted in the statements but were instead admitted as nonhearsay to explain Trunzo's conduct. Thus, Klepper's statements do not implicate the Confrontation Clause at all (see *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 11 n.11).

Although some of Conn's statements were admitted for the truth of the matters asserted, petitioner did not preserve below any objection to those statements on the basis of the Confrontation Clause, nor did he identify the particular statements he wished to challenge. Petitioner therefore may not raise the issue here. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Gibbs*, 739 F.2d 838, 846-848 (3d Cir. 1984) (en banc), cert. denied, No. 84-364 (Jan. 7, 1985).

Moreover, Conn's statements were reliable under any standard. On both occasions when Hake met with Conn to make payoffs, petitioner had directed Hake to "see [Conn]" after the court proceedings were over (GXs Benson 1, 1A; GXs Cramer 1, 1A). On the third occasion when Hake made a payment in connection with one of his cases, he made it directly to petitioner (GXs Cramer 2, 2A). The payment was made in connection with further proceedings in a case on which Hake had previously made a payment to petitioner through Conn. In light of petitioner's acceptance of money directly from Hake on one occasion and his conduct in referring Hake to Conn to make payments on other occasions, Conn's statements confirming that the payments were going to petitioner were well corroborated and thus shown to be reliable.

In addition, Conn's statements related to contemporaneous events about which Conn had first-hand knowledge. There was therefore no risk that the statements might be unreliable because of inaccuracies in Conn's recollection of past events. Finally, Conn had no reason to lie, because Conn was expecting bribe money from Hake on a continuing basis, and Conn would only have jeopardized any future payments if he had lied to Hake. In these circumstances, Conn's statements would have been admitted even in the courts that require an independent analysis of the reliability of co-conspirator declarations under the Confrontation Clause. See *United States* v. *DeLuna*, 763 F.2d at 910 (discussing indicia of reliability).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

AUGUST 1986